Supreme Court, U.S.
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No. 97-1541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HEATHER SMITH and her parents, SHARON SMITH and JOHN SMITH,

Petitioners,

vs.

METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, BOARD OF METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, LLOYD BODIE, in his official capacity as Principal of Southport High School, and LARRY HENSLEY-MARSCHAND, in his official capacity as Assistant Principal of Southport High School,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Seventh Circuit Court of Appeals correct in finding that the proper standard of liability for a school district under Title IX of the Education Amendments of 1972, U.S.C. §1681, *et seq.*, for a teacher's sexual harassment of a student is that of actual knowledge on the part of the school, or a supervisor of the harassing employee, and failure to take action?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. STATEMENT OF THE FACTS	1
B. PRIOR PROCEEDINGS	4
REASONS FOR DENYING THE WRIT	
I. THE SEVENTH CIRCUIT'S INTERPRETATION OF TITLE IX LIABILITY OF A SCHOOL DISTRICT FOR ALLEGED VIOLATIONS BY AN EMPLOYEE WITHOUT THE SCHOOL'S KNOWLEDGE IS CONSISTENT WITH THE LEGISLATIVE HISTORY AND THE STATUTORY LANGUAGE.	4
II. THE SEVENTH CIRCUIT WAS CORRECT IN REJECTING THE INTERPRETATION OF THE ADMINISTRATIVE AGENCY THAT ENFORCES TITLE IX AS: (1) SMITH DID NOT ARGUE THE APPLICATION OF THE ADMINISTRATIVE AGENCY'S INTERPRETATION OF TITLE IX LIABILITY TO EITHER THE DISTRICT COURT OR THE SEVENTH CIRCUIT COURT OF APPEALS; (2) THE ADMINISTRATIVE AGENCY'S INTERPRETATION OF TITLE IX LIABILITY LACKS LEGAL FOUNDATION IN THAT IT OVERLOOKS THE FACTS THAT THE TITLE IX STATUTE IS VOID OF NEGLIGENCE OR AGENCY LANGUAGE AND ITS	

Page

SPENDING CLAUSE SOURCE; AND (3) THE ADMINISTRATIVE AGENCY'S INTERPRETATION THAT SMITH ARGUES APPLIES WAS ENACTED OVER FIVE YEARS AFTER THE ALLEGED HARASSMENT HEREIN..... 9

III. ALTHOUGH THE SEVENTH CIRCUIT'S DECISION HOLDING THAT A SCHOOL DISTRICT CAN BE LIABLE FOR TEACHER-STUDENT HARASSMENT UNDER TITLE IX ONLY IF A SCHOOL OFFICIAL HAD ACTUAL KNOWLEDGE OF THE ABUSE IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER CIRCUITS, IT IS A WELL-REASONED OPINION ROOTED IN THE LANGUAGE OF THE STATUTE AND ITS ORIGIN OF SPENDING CLAUSE LEGISLATION AND IS CONSISTENT WITH THE TWO OTHER CIRCUITS THAT HAVE ANALYZED THE HISTORY AND LANGUAGE OF THE STATUTE, AND THEREFORE, SMITH'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED. 11

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases:	Page
Baker v. Runyon, 114 F.3d 668, 680 (7th Cir. 1997).	6
Brown v. Hot, Sexy and Safer Products, 68 F.3d 525 (1st Cir. 1995), *cert. den.*, 116 S. Ct. 1044 (1996)	11
Cannon v. University of Chicago, 441 U.S. 677 (99 S. Ct. 1946), 60 L. Ed. 2d 560 (1979)	5
Court v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)	5
Davis v. Monroe Cty. Bd. of Education, 120 F.3d 1390 (11th Cir. 1997)	13
Doe v. Claiborne County, Tennessee, 103 F.3d 495 (6th Cir. 1996)	12
Doe v. Lago Vista Independent Sch. Dist., 106 F.3d 1223 (5th Cir. 1997), *cert. granted* (Dec. 5, 1997)	14
Doe v. Reivitz, 830 F.2d 1441, 1447 (7th Cir. 1987).	9
Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994)	7
Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998)	13
Franklin v. Gwinnett County Public Schools, 503 U.S. 60. 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992)	5, 6, 7, 11, 12, 13
Guardian Ass'n v. Civil Service Comm'n of New York, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983)	6
Hastings v. Hancock, 842 F. Supp. 1315, 1318 (D. Kan. 1993)	13
Kadiki v. Virginia Comm. Univ., 892 F. Supp. 746, 749 (E.D. Va. 1995)	13

Cases: **Page**

Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996) 12

Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997) 12

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) 11, 12

Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311 (10th Cir.), *cert. den.*, 484 U.S. 849 (1987) 13

Meritor Savings Bank, F.S.B. v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) 7

Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995) 12

Nelson v. Almont Comm. Sch., 931 F. Supp. 1345, 1354 (E.D. Mich. 1996) 13

Oona, R.S. v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997) 12, 13

Patricia H. v. Berkeley Unified School District, 830 F. Supp 1288 (N.D.Cal. 1993) 7

Pennhurst State School & Hospital v. Halderman, 451 U.S. 28-29, 101 S. Ct. 1531, 1545-1546, 67 L. Ed. 2d 694 (1981) 6

Pennington v. Didrickson, 22 F.3d 1376, 1383 (7th Cir. 1994) 10

Preston v. Commonwealth of Virginia, ex rel. New River Community College, 31 F.3d 203 (4th Cir. 1994) 13

Roberts v. Colorado State Bd. of Agriculture, 998 F.2d 824 (10th Cir.), *cert. den.*, 510 U.S. 1004 (1993) 13

Cases:	**Page**
Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997)	10, 13
Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. den.*, 117 S. Ct. 165 (1996)	13
Stone Key v. Bradford Area School District, 882 F.2d 720 (3d Cir. 1989)	7
Statutes:	
20 U.S.C. § 1681-1688	5
20 U.S.C. § 1681(a)	5
20 U.S.C. § 1687	7
42 U.S.C. § 2000(e)(b)	7
I.C. 20-8.1-3-17	1
P.L. 1-1992 § 16	1
P.L. 1-1992 § 101	1
P.L. 1-1993 § 180	1
P.L. 34-1991 § 23	1
Rule:	
Supreme Court Rule 10	4
Other Authority:	
Restatement (Second) of Agency § 219(2)(d)	4, 8

STATEMENT OF THE CASE

A. Statement of Facts

Heather Smith's (hereinafter referred to as "Smith") date of birth is August 23, 1973. (Smith's Dep., p.5, l.1). The relevant time period alleged by Smith herein is from September 1990 until June 1991. (Plaintiff's Complaint, ¶9). At the relevant time period, the plaintiff was seventeen years of age. (Smith's Dep., p.5, l.1; Plaintiff's Complaint, ¶9). Indiana's Compulsory Attendance Law did not require a seventeen-year old to attend school. (See I.C. 20-8.1-3-17 as provided for by P.L. 34-1991 § 23. That statute has since been amended by P.L. 1-1992 § 101; P.L. 1-1992 § 16; and P.L. 1-1993 § 180). During the September 1990 to May 1991 school year, plaintiff, Heather Smith, was a senior at Southport High School. (Smith's Dep., p.9, l.23; p.10, l.1-3).

During the relevant time period, Steven Rager (hereinafter referred to as "Rager") was a teacher of physical education and boys' swim team coach at Southport High School. (Rager's Dep., p.11, l.13-21; p.15, l.22-23; p.16, l.1-3). Rager had been an employee of the Metropolitan School District of Perry Township and the Board of Metropolitan School District of Perry Township since 1973, over nineteen years. (Rager's Dep., p.10, l.11-13).

The Metropolitan School District of Perry Township is a political subdivision located in Marion County, Indiana. (Plaintiff's Complaint, ¶3; Defendant's Answer, ¶1). The Board of Metropolitan School District of Perry Township is the duly elected ruling body of the school district and is responsible for the operation of the public schools in the district, including Southport High School. (Plaintiff's Complaint, ¶4; Defendant's Answer, ¶1).

During the relevant time period, Dr. Lloyd Bodie was the Principal of Southport High School. (Bodie's Dep., p.4, l.17-22).

During the relevant time period, Larry Hensley-Marschand was one of the Assistant Vice-Principals of Southport High School. (Hensley-Marschand's Dep., p.5, l.1-3).

Neither Bodie, Hensley-Marschand, the school board, or the school district had received any complaints regarding inappropriate sexual behavior of Steven Rager during the history of his employment with Southport High School prior to Smith's allegations herein. (Bodie's Dep., p.44, l.4-15; Hensley-Marschand's Dep., p.15, l.1-3).

Smith knew Rager from her participation in PTSA, a summer swimming program unrelated to the school district, school board, its employees, and this cause of action. (Smith's Dep., p.8, l.5-14). Smith believed that she and Rager had become close friends over the summer preceding the relevant 1990-1991 school year. (Smith's Dep., p.4, l.1-5; p.12, l.12-23). Smith considered Rager's relationship with her parents to be "close." (Smith's Dep., p.104, l.14-16).

During the 1990-1991 school year, Smith was a student assistant to Rager during her fifth period study hall. (Smith's Dep., p.10, l.23; p.11, l.1-2). Smith did not receive a grade from Rager for her student assistant position. (Pickard's Dep., p.16, l.1-11). Smith alleges that during the course of the 1990-1991 school year, she engaged in a sexual relationship with Rager. More specifically, Smith alleges: (i) initially, she liked the sexual relationship (Smith's Dep., p.106, l.3-6); (ii) Smith advised Rager that she loved him (Smith's Dep., p.21, l.22-23; p.22, l.1-5); (iii) Smith never said no to Rager's advances (Smith's Dep., p.17, l.19-21; p.19, l.1-2; p.20, l.3-23); (iv) Smith responded to Rager's advances (Smith's Dep., p.16, l.19-22); (v) Rager did not force himself upon Smith (Smith's Dep., p.19, l.3-5); and (vi) Smith's sole and primary concern regarding ending the sexual relationship with Rager was the loss of his friendship (Smith's Dep., p.20, l.13-23; p.110, l.23; p.111, l.1-6).

After the end of the 1990-1991 school year, Smith continued to be in contact with Rager through her employment at

his scuba diving shop and her continued participation the summer swimming program. (Smith's Dep., p.85, l.1-23).

Smith did not tell anyone of the alleged harassment of her by Rager until July 28, 1991. At that time, she told her boyfriend, David Hinojosa. (Smith's Dep., p.37, l.15-20). On July 29, 1991, Smith told her parents of the alleged sexual harassment by Rager. (Smith's Dep., p.38, l.12-23; p.39, l.1-5).

On July 30, 1991, the plaintiff and her parents advised the school board of the alleged sexual harassment by Rager. (Smith's Dep., p.40, l.9-23). On August 1, 1991, Dr. Daniel Bolin, Assistant Superintendent; Dr. Raymond Fatheree, Superintendent; Dr. Bodie; and Mr. Louis Borgman, attorney for the school district and the school board, met with Steven Rager, his wife, and Rager's attorney. At that time, Rager was advised that he was the subject of an investigation of a sexual harassment claim by Heather Smith which could lead to his termination. (Bolin's Dep., p.62-63; Fatheree's Dep., p.24-25). Steve Rager tendered his resignation on August 2, 1991. (Bolin's Dep., p.66). Superintendent Fatheree, despite Steve Rager's resignation, still sent a letter to the State of Indiana recommending that Rager's teaching license be removed. (Fatheree's Dep., p.25).

The school district and the school board had never received any complaints of sexual harassment by a teacher prior to Smith's allegations against Rager. (Fatheree's Dep., p.24). The Metropolitan School District of Perry Township and the Board of Metropolitan School District of Perry Township did not adopt a written sexual harassment policy until April, 1991. (Bolin's Dep., p.45-47). At that time, the policy was distributed to all employees of the school board and the school district. (Bolin's Dep., p.45-47; Fatheree's Dep., p.22). Prior thereto, the district and board had conducted Title IX workshops or seminars for their administrative employees, but not for their teachers. (Bolin's Dep., p.23; Fatheree's Dep., p.14-15). The administrators were encouraged, but not required, to disseminate the information to employees under them. (Fatheree's Dep., p.23).

B. Prior Proceedings

Respondents agree with Smith's rendition of the Prior Proceedings contained on pages 6 and 7 of her brief, with the following specification.

The district court, in denying summary judgment on Smith's Title IX claim, specifically adopted Title VII's negligence "knew or should have known" standard and Restatement (Second) 219(2)(d)'s "abuse of authority creates absolute liability" standard. (See district court opinion contained in Smith Appendix, a-89 through a-111, at a-105.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT'S INTERPRETATION OF TITLE IX LIABILITY OF A SCHOOL DISTRICT FOR ALLEGED VIOLATIONS BY AN EMPLOYEE WITHOUT THE SCHOOL'S KNOWLEDGE IS CONSISTENT WITH THE LEGISLATIVE HISTORY AND THE LANGUAGE OF THE STATUTE.

The Seventh Circuit ruled herein that a school would be liable under Title IX for the sexual harassment of a student by an employee if the school, or an individual in a supervisory capacity over the harassing employee, knows of the harassment and fails or refuses to act. This standard rejects Title VII negligence and common law agency principles. In this specific case, it rejects the district court's application of a Title VII negligence "knew or should have known" standard and an application of the "abuse of authority" standard from the Restatement (Second) of Agency § 219(2)(d). Smith argues that the standard adopted by the Seventh Circuit is in error as it is counter to congressional intent and contrary to public policy. This argument does not fall into any of the categories specified in Part 3, Jurisdiction of Writ on Certiorari, Rule 10, Considerations Governing Review on Certiorari of the Rules of the United States Supreme Court. Therefore, Smith's petition for certiorari on the grounds that it is contrary to public policy and congressional intent should be denied.

However, the Seventh Circuit's standard of a school district's Title IX liability for violations by an employee is, in fact, consistent with congressional intent and the legislative history and language of the statute. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 (Title IX) provides, in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681(a).

With the enactment of Title IX, Congress sought to avoid the use of federal resources to support discriminatory practices. *Cannon v. University of Chicago,* 441 U.S. 677 (99 S. Ct. 1946), 60 L. Ed. 2d 560 (1979). In *Cannon,* this court recognized the implied right of private action under Title IX. In that case, a university student brought suit alleging that she had been excluded from the medical education program on the basis of her gender. The district court dismissed her case holding that the proper remedy was the loss of federal funds by the institution. This court disagreed, and after analyzing the four factors of *Court v. Ash,* 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), held that the female student could maintain her lawsuit despite the absence of any express authorization for it in Title IX.

In *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60. 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), this court held that monetary damage remedies are available for private actions brought for *intentional* violations of Title IX. *Franklin,* 112 S. Ct. at 1036. This court's "intentional violation" requirement or element in *Franklin* was in response to the Respondent's argument that Title IX was enacted pursuant to Congresses' spending clause. The Seventh Circuit found in the case at bar that Title IX was enacted pursuant to Congresses' spending power. (See majority opinion, Smith's Petition, Appendix, a-31). Smith has never argued otherwise.

Statutes adopted pursuant to Congresses' spending power allow recovery only where plaintiff shows discriminatory intent. Otherwise, damages are limited. *Guardian Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983) (plurality opinion). In *Franklin*, this court, citing to *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 28-29, 101 S. Ct. 1531, 1545-1546, 67 L. Ed. 2d 694 (1981), explained at page 1037:

> The point of not permitting monetary damages for unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. *(citation omitted)* This notice problem does not arise in a case such as this in which intentional discrimination is alleged.

The question has obviously arisen, intentional on the part of whom? The Seventh Circuit's ruling that the intentional violation must be on the part of the entity or program in receipt of the federal funds is consistent with the statute's legislative origin and history. It is only logical that if an intentional violation is warranted in order to fulfill the "notice" requirement necessitated under spending clause legislation, that the intentional act be on the part of the entity who was entitled to such notice. That entity would be the school districts and boards at the time that they are in receipt of the federal funds. To hold otherwise would be to void the intentional requirement on the part of the very entity that is sought to be held liable. School districts could be held liable for violations of Title IX for which they had absolutely no knowledge under applications of agency and negligence principles. In fact, that is exactly what Smith seeks to do in the case at bar.

The legislative origin of the statute supports the Seventh Circuit ruling herein. Further, the Seventh Circuit's standard of liability is consistent with the language of the statute itself. "The plain language of the statute is the most reliable indicator of Congressional intent." *Baker v. Runyon*, 114 F.3d 668, 680 (7th Cir. 1997). Title IX, unlike Title VII, provides that

the "program or activity" in receipt of the federal funds, not discriminate on the basis of sex. Title VII, on the other hand, which is *not* spending clause legislation, prohibits discrimination on the part of an employer which, by definition, includes "any agent of such a person." 42 U.S.C. § 2000(e)(b). This court held that agency principles applied in Title VII cases in *Meritor Savings Bank, F.S.B. v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), specifically based upon the inclusion of the word "agent" in the definition of employer. Under Title IX, the definition of "program or activity" includes "all of the operations of . . . a local education agency . . . or other school system." 20 U.S.C. § 1687. This definition does not include agents of such entities. Thus, the Seventh Circuit ruling is consistent not only with the statute's source of spending clause power, but also with a thorough reading of the specific statutory language.

Smith asserts that the standard adopted in the Seventh Circuit opinion would "insulate schools from liability." This statement simply is not true. Many, many, 1983 and Title IX cases contain allegations of actual knowledge on the part of appropriate school officials including *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992); *Patricia H. v. Berkeley Unified School District,* 830 F. Supp 1288 (N.D.Cal. 1993); *Stone Key v. Bradford Area School District,* 882 F.2d 720 (3d Cir. 1989); and *Doe v. Taylor Independent School District,* 15 F.3d 443 (5th Cir. 1994). Additionally, potential plaintiffs have other causes of action that may cover the situation, including 1983 claims in appropriate circumstances and common law actions (such as Smith brings here), many of which include negligence and agency principles, i.e., negligent hiring, retention, negligent supervision, negligent monitoring, negligent training, negligent entrustment, and respondeat superior liability.

The decision here is not one between no liability and negligence-based liability. The decision here is between liability based on actual knowledge/intentional conduct and vicarious liability without any wrongful conduct on the part of the entities sought to be held liable. Due to Title IX's nature as

spending clause legislation and the absence of the word "agent" therein, policy would certainly dictate that the entity sought to be held liable have actual knowledge of the alleged harassment before liability attaches.

Further, a number of agency theories, including the 219(2)(d) standard of Restatement (Second) adopted by the district court herein, would result in strict liability on the part of the school when the school itself did not engage in any wrongful conduct nor had any knowledge of it. Schools would become the insurers of children. Already financially strapped schools could then find themselves liable for multi-million dollar lawsuits when (1) they had committed no wrongful act, nor had any knowledge of it; and (2) did not anticipate such liability exposure at the time of the agreement to accept the federal funds. If the schools, governmental entities, and the tax payers had such knowledge, they may have opted out of the federal funds participation. To hold the schools liable on a strict liability basis would run contrary to the very nature of spending clause legislation which is premised upon the agreement between the parties of accepting their federal funds in exchange for compliance with known federal standards.

II.

THE SEVENTH CIRCUIT WAS CORRECT IN REJECTING THE INTERPRETATION OF THE ADMINISTRATIVE AGENCY THAT ENFORCES TITLE IX AS: (1) SMITH DID NOT ARGUE THE APPLICATION OF THE ADMINISTRATIVE AGENCY'S INTERPRETATION OF TITLE IX LIABILITY TO EITHER THE DISTRICT COURT OR THE SEVENTH CIRCUIT COURT OF APPEALS; (2) THE ADMINISTRATIVE AGENCY'S INTERPRETATION OF TITLE IX LIABILITY LACKS LEGAL FOUNDATION IN THAT IT OVERLOOKS THE FACT THAT THE TITLE IX STATUTE IS VOID OF NEGLIGENCE OR AGENCY LANGUAGE AND ITS SPENDING CLAUSE SOURCE; AND (3) THE ADMINISTRATIVE AGENCY'S INTERPRETATION THAT SMITH ARGUES APPLIES WAS ENACTED OVER FIVE YEARS AFTER THE ALLEGED HARASSMENT HEREIN.

Smith next argues that the Seventh Circuit erred in according insufficient weight to the administrative guidance of the United States Department of Education Office for Civil Rights (O.C.R.), which has responsibility for administering Title IX. First, it should be noted that Smith did not make this argument either to the district court or to the Seventh Circuit. (See Seventh Circuit's Opinion contained in Smith's Appendix at a-44). Secondly, although the policy guidelines include a comprehensive discussion of numerous examples of situations where school systems would be exposed to liability under agency principles, it fails to examine the statutory language of Title IX, its spending clause source, or the significant difference between it and Title VII. As noted by the majority opinion of the Seventh Circuit, it provides no rationale for applying agency principles and thus no basis for its liability standard.

Further, as noted in *Doe v. Reivitz,* 830 F.2d 1441, 1447 (7th Cir. 1987): "Agency interpretations, unlike legislative

rules, are not controlling on the courts . . .". The amount of deference to be given to the interpretation of a statute by an agency can only coincide with the logic and reason behind the agency's interpretation. One cannot expect a court to blindly follow the interpretations of an administrative agency that are not founded in the law and logic. The O.C.R.'s interpretation of Title IX liability does not address the spending clause source of the statute nor the lack of agency language in the statute. The "weight given to an agency interpretation depends on many factors, including the validity of its reasoning . . ." *Pennington v. Didrickson,* 22 F.3d 1376, 1383 (7th Cir. 1994). In the Title IX setting, the O.C.R. provides no validity for its reasoning and therefore its interpretations are not accorded any weight by the Seventh Circuit Court of Appeals.

Finally, it should be noted that the O.C.R.'s "final policy guidance" was issued on March 13, 1997, nearly six years after the alleged incidents occurred herein. It just seems wrong to adopt liability standards that were not formulated until approximately six years after the alleged incident occurred. As the Fifth Circuit pointed out in *Rosa H. v. San Elizario Indep. Sch. Dist.,* 106 F.3d 648 (5th Cir. 1997) at 658:

> [W]e cannot apply these guidelines retroactively . . . [R]ecipients of Title IX funds are bound by their agreement with the federal government. The government can add strings to the Title IX funds as it disperses them. But it cannot modify *past* agreements with recipients by unilaterally using guidelines through the Department of Education.

Thus, it would not be reasonable to adopt the O.C.R.'s recently finalized policy guidance as controlling in this case.

Due to the fact that Smith failed to argue the application of the O.C.R.'s guidelines to the district court or to the Seventh Circuit Court of Appeals; the O.C.R.'s lack of statutory foundation and analysis regarding the source and language of the statute in the adoption of its interpretation, and the fact that application of the O.C.R. guidelines would result in a

retroactive standard of liability, this court should deny Smith's Petition for a Writ of Certiorari.

III.

ALTHOUGH THE SEVENTH CIRCUIT'S DECISION HOLDING THAT A SCHOOL DISTRICT CAN BE LIABLE FOR TEACHER-STUDENT HARASSMENT UNDER TITLE IX ONLY IF A SCHOOL OFFICIAL HAD ACTUAL KNOWLEDGE OF THE ABUSE IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER CIRCUITS, IT IS A WELL-REASONED OPINION ROOTED IN THE LANGUAGE OF THE STATUTE AND ITS ORIGIN OF SPENDING CLAUSE LEGISLATION AND IS CONSISTENT WITH THE TWO OTHER CIRCUITS THAT HAVE ANALYZED THE HISTORY AND LANGUAGE OF THE STATUTE, AND THEREFORE, SMITH'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

The Seventh Circuit's decision conflicts with a number of other circuits on the issue of application of agency and negligence principles to Title IX. However, the Seventh Circuit's opinion follows the more well-reasoned analyses of the Eleventh and Fifth Circuit Courts of Appeal. In fact, the standard adopted by the Seventh Circuit is in conformity with the opinions of other circuits which have given this issue more than a cursory analysis.

The first conflicting opinion cited by Smith is *Lipsett v. University of Puerto Rico,* 864 F.2d 881 (1st Cir. 1988). *Lipsett* is a pre-*Franklin* employment discrimination decision. Further, the *Lipsett* opinion specifically holds at 897: "Similarly, our present holding - that the Title VII standard for proving discriminatory treatment should apply to claims of sex discrimination arising under Title IX - is limited to the context of employment discrimination." Therefore, the *Lipsett* opinion is not in conflict with this court's opinion as it does not reach the issue. The First Circuit went on in *Brown v. Hot, Sexy and Safer Products,* 68 F.3d 525 (1st Cir. 1995), *cert. den.,* 116 S. Ct. 1044 (1996) to conduct the following

"in-depth" analysis: "Because the relevant case law under Title IX is relatively sparse, we apply Title VII case law by analogy." The First Circuit cites to *Franklin* and *Lipsett,* conducting no analysis whatsoever. Like the O.C.R.'s interpretation, an opinion is only as valid as its underlying reasoning. The First Circuit has conducted none.

Smith next cites to two cases from the Second Circuit. The case of *Murray v. New York Univ. College of Dentistry,* 57 F.3d 243 (2d Cir. 1995), is a claim of sexual harassment perpetrated by a patient of a college dental clinic against a participant in a dentistry school's program as a clinic employee. That case simply cited to and relied on *Franklin* for the principle that Title VII agency theories apply in a Title IX action. In the case of *Kracunas v. Iona College,* 119 F.3d 80 (2d Cir. 1997), the court adopted the *Murray* opinion while almost acknowledging that it resulted in a strict liability standard. It did not analyze Title IX language, nor its spending clause nature.

Next, Smith refers us to the Sixth Circuit and the case of *Doe v. Claiborne County, Tennessee,* 103 F.3d 495 (6th Cir. 1996). That decision states: "Because Title VII sexual harassment and sexual discrimination principles have been so well litigated, while Title IX has a short historical parentage, courts have and do resort to Title VII standards to resolve sexual harassment claims brought under Title IX." *Doe* at 514. That decision then goes on to conclude, after citing *Franklin,* "There is ample authority to support our conclusion that Title VII agency principles apply to resolve discrimination claims brought under Title IX." *Id.* In essence, the Sixth Circuit relies on "ample authority" that has been "resorted to" simply because Title VII sexual harassment has been "so well litigated."

Both the Eighth Circuit's *Kinman v. Omaha Pub. Sch. Dist.,* 94 F.3d 463 (8th Cir. 1996) and the Ninth Circuit's *Oona, R.S. v. McCaffrey,* 122 F.3d 1207 (9th Cir. 1997) contain similar cursory analyses. *Kinman* conducts the analysis in two short paragraphs at page 469, without any discussion

regarding the statutory language or its spending clause source. The *Oona* decision does not reach the issue and the dictum is without analysis. In *Oona*, the sole issue before the court is whether the individual defendants were entitled to qualified immunity and thus, summary judgment on Oona's 1983 claim. *Oona,* 122 F.3d at 1208. The brief discussion of institutional liability standard under Title IX in *Oona* was purely dictum.

The case of *Preston v. Commonwealth of Virginia, ex rel. New River Community College,* 31 F.3d 203 (4th Cir. 1994) is a case of a retaliatory discharge employment discrimination. It does not adopt agency principles in a sexual harassment student-teacher case. It is not in conflict with the majority opinion herein. Nor is the opinion of the Tenth Circuit in *Mabry v. State Bd. of Community Colleges and Occupational Educ.,* 813 F.2d 311 (10th Cir.), *cert. den.,* 484 U.S. 849 (1987), a pre-*Franklin* employment discrimination case, or *Roberts v. Colorado State Bd. of Agriculture,* 998 F.2d 824 (10th Cir.), *cert. den.,* 510 U.S. 1004 (1993), an injunction case seeking to reinstate a women's softball team wherein the application of Title VII principles was used to determine if discriminatory intent versus discriminatory impact is required.

In summary, the Seventh Circuit rejects joining the opinion of other circuits adopting Title VII negligence and agency principles as their opinions are without legal analysis or statutory foundation. The Seventh Circuit opinion follows the Fifth and Eleventh Circuits' and district court's opinions that have analyzed the statute and the issue. See *Rosa H. v. San Elizario Indep. Sch. Dist.,* 106 F.3d 648 (5th Cir. 1997); *Rowinsky v. Bryan Indep. Sch. Dist.,* 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. den.,* 117 S. Ct. 165 (1996); *Davis v. Monroe Cty. Bd. of Education,* 120 F.3d 1390 (11th Cir. 1997); *Floyd v. Waiters,* 133 F.3d 786 (11th Cir. 1998); *Nelson v. Almont Comm. Sch.,* 931 F. Supp. 1345, 1354 (E.D. Mich. 1996); *Hastings v. Hancock,* 842 F. Supp. 1315, 1318 (D. Kan. 1993); and *Kadiki v. Virginia Comm. Univ.,* 892 F. Supp. 746, 749 (E.D. Va. 1995).

Finally, as this court has recently granted a certiorari petition to decide a similar issue present in *Doe v. Lago Vista Independent Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997), *cert. granted* (Dec. 5, 1997), in which this court will undoubtedly adopt the standards set forth by the well-reasoned opinions of the Seventh, Fifth and Eleventh Circuits, therefore this court should deny Smith's petition for a writ of certiorari.

CONCLUSION

The Seventh Circuit's interpretation of Title IX liability of a school district for alleged violations by an employee without the school's knowledge is consistent with the legislative history and the language of the statute.

The Seventh Circuit was correct in rejecting the interpretation of the administrative agency that enforces Title IX as: (1) Smith did not argue the application of the administrative agency's interpretation of Title IX liability to either the district court or the Seventh Circuit Court of Appeals; (2) The administrative agency's interpretation of Title IX liability lacks legal foundation in that it overlooks the fact that the Title IX statute is void of negligence or agency language and its spending clause source; and (3) The administrative agency's interpretation that Smith argues applies was enacted over five years after the alleged harassment herein.

Although the Seventh Circuit decision holding that a school district can be liable for teacher-student harassment under Title IX only if a school official had actual knowledge of the abuse is in conflict with the decisions of several other circuits, it is a well-reasoned opinion rooted in the language of the statute and its origin of spending clause legislation and is consistent with the two other circuits that have analyzed the history and language of the statute, and therefore, Smith's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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